86 1991

Supreme Court, U.S.
FILED
JUN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CHUCK'S FEED & SEED CO., INC.
Petitioner

v.

RALSTON PURINA COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MORRIS D. ROSEN*
SUSAN C. ROSEN
TARA O. HAWK
Rosen, Rosen & Hagood
P.O. Box 893
CHARLESTON, SC 29402
(803) 577-6726

ATTORNEYS FOR PETITIONER
**COUNSEL OF RECORD*

Questions Presented

1. Whether the scope of the South Carolina Unfair Trade Practices Act should be distinguished from that of the Sherman Act, the Clayton Act and the Federal Trade Commission Act.

2. Whether a dealership agreement which does not require the dealer to deal exclusively with a certain product, but instead specifically prohibits termination of a dealer for failing to deal exclusively with certain products, gives rise to an exclusive dealing arrangement or to a wrongful termination.

3. Whether the factual predicate for the granting of a directed verdict on a common law claim for wrongful termination is identical to that which is required for granting a verdict on an unfair trade practice claim.

4. Whether the Fourth Circuit Court of Appeals, in reversing the decision of the District Court, overlooked relevant facts presented in evidence at the District Court trial concerning the extent to which the Defendant, Ralston Purina, attempted to foreclose the market to competitors by use of unlawful, anti-competitive and retaliatory conduct.

Table of Contents

	Page
Opinions Below	1
Jurisdiction	2
Statement	2
Reasons for Granting the Petition	3
Conclusion	10
Appendix A	1a
Appendix B	14a
Appendix C	16a

Table of Authorities

Cases:

Adolf Coors Co. v. Federal Trade Commission, 497 F.2d 1178 (10th Cir. 1974) 8

Bostick Oil v. Michelin Tire Co., 702 F.2d 1207 (4th Cir. 1983), *cert. den.* 464 U.S. 894 (1983) 4, 5, 6, 7, 8, 10

Federal Trade Commission v. Brown Shoe Co., 384 U.S. 316 (1966) 6, 8

Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953) 6

Federal Trade Commission v. Sperry and Hutchinson Co., 405 U.S. 233 (1972) 6

Gaines W. Harrison & Sons, Inc. v. J.I. Case Co., Inc., 180 F. Supp. 243 (E.D.S.C. 1960) 7

Glaesner v. Beck/Arnley Corp., 790 F.2d 384 (4th Cir. 1986) 6, 7

State ex rel. McLeod v. C&L Corp., 280 S.C. 519 313 S.E.2d 334 (S.C. App. 1984) 6

Statutes:

Section 3 Clayton Act, 15 U.S.C.A. Section 14, *et seq.* 2

Section 1 Sherman Antitrust Act, 15 U.S.C.A. Section 1, *et. seq.* 2

Sections 39-5-20 *et seq.*, South Carolina Code of Laws (1976 as amended) 2

Sections 39-5-140(a), South Carolina Code of Laws (1976 as amended) 3

Section 5(a)(1), Federal Trade Commission Act, 15 U.S.C. Section 45(a)(1) 5

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CHUCK'S FEED & SEED CO., INC.
Petitioner

v.

RALSTON PURINA COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Chuck's Feed and Seed Co., Inc., respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The opinion of the Fourth Circuit Court of Appeals reversing the District Court's judgment in favor of Petitioner appears in Appendix A to the Petition, and is reported at 810 F.2d 1289. The order of the Court of Appeals denying the Petition for Rehearing with suggestion for rehearing en banc appears in Appendix B. The Judgment of the District Court appears in Appendix C.

Jurisdiction

The opinion of the Fourth Circuit Court of Appeals (Appendix A) was entered on February 9, 1987. A Petition for Rehearing with suggestion for Rehearing En Banc was denied on March 11, 1987 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statement

This action was commenced by the filing of a Complaint against the Ralston Purina Company on January 25, 1983, in the United States District Court for the District of South Carolina. Plaintiff sought recovery from Defendant on four causes of action: (1) violation of Section 3 of the Clayton Act, 15 U.S.C.A. Sections 14, *et seq.;* (2) violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C.A. Section 1, *et seq.;* (3) violation of the South Carolina Unfair Trade Practices Act, South Carolina Code Section 39-5-20, *et seq.* (1976); and (4) a South Carolina State common law cause of action for wrongful termination of the Plaintiff's dealership by Defendant.

At the time of the trial, Defendant made a motion for directed verdict on the wrongful termination, Sherman Act, and Clayton Act causes of action. The Court denied Defendant's motion for a directed verdict on the Sherman and Clayton Act causes of action and took under advisement the motion for a directed verdict under the wrongful termination cause of action. Plaintiff suggested that if the Court were to allow the jury to deliberate on the unfair trade practice cause of action, then it would withdraw the common law claim for wrongful termination.

On March 13, 1985, Defendant renewed its motion on the common law wrongful termination cause of action. The

District Court then decided not to charge the jury on the State common law action for wrongful termination.

Following argument and charge, the jury returned a verdict for the Defendant on the Sherman Act and the Clayton Act causes of action. A verdict for the Plaintiff was returned on the South Carolina Unfair Trade Practices Act cause of action for Seventy-Eight Thousand, Seven Hundred Fifty ($78,750.00) Dollars. On July 11, 1985, the District Court found that the termination by Defendant was a willful violation of the Act, and under South Carolina Code Section 39-5-140(a) (1976), assessed three times the damage award returned by the jury, together with attorneys' fees and costs. A judgment in the amount of Three Hundred Twenty-Three Thousand, One Hundred Twenty-Nine and 75/100 ($323,129.75) Dollars was entered on July 22, 1985. Motions for judgment notwithstandng the verdict or for a new trial were denied by the Court on October 28, 1985.

The Fourth Circuit Court of Appeals reversed the judgment of the District Court and held that the District Court erred in denying the Defendant's motion for judgment notwithstanding the verdict on the grounds that the Petitioner herein failed to offer relevant evidence sufficient to show a negative impact on competition in the market as a whole. (Appendix A) A Petition for rehearing with suggestion for rehearing *en banc* was denied on March 11, 1987 by the same three judge panel (Appendix B).

Reasons for Granting the Writ

The decision of the United States Court of Appeals for the Fourth Circuit completely overlooks and ignores the facts before the Court in the present litigation and conflicts with the settled law of the Fourth Circuit and other jurisdictions. This case involves the termination of a dealership pursuant to the Defendant's illegal, oppressive, and anti-competitive

plan to foreclose competition in the marketplace. Considering the District Court's charge on the South Carolina Unfair Trade Practices Act, this conclusion is implicit in the jury's verdict; in fact, the District Court so held. The District Court properly charged the jury that it could determine whether or not an act violated the Unfair Trade Practices Act by "viewing it against the background of actual human experience and by determining its intent and actual effect upon others"; that whether it "offends established public policies, as well as when the practice is immoral, unethical, oppressive, or substantially injurious to consumers"; and that an unfair act or practice occurs when a party is "engaged in conduct which amounts to inequitable assertions of its power or position and such actions are contrary to honest commercial practices." The District Court, following the jury verdict, and in response to Ralston Purina's Motion for Judgment notwithstanding the verdict held that Defendant's "whole motivation. . . was to reduce competition"; and that the "only reasonable conclusion" to be reached from the testimony was that termination of Plaintiff's dealership by Defendant was to "control competition or limit competition or control the market. . . ."

The Opinion of the Fourth Circuit Court of Appeals relied on an analysis of exclusive dealing arrangements under the Federal Trade Commission Act. This case, however, does not involve an exclusive dealing arrangement. Rather, Ralston Purina's own policy specifically disallowed termination of an authorized Purina dealer for failing to sell Purina feeds exclusively. In fact, Plaintiff had sold other feeds continuously since becoming a Purina dealer. Rather, the termination of Plaintiff's dealership was in furtherance of the Defendant's scheme to foreclose the Tri-County market to a recognized competitor, ConAgra, and the District Court so held.

In *Bostick Oil Co. v. Michelin,* 702 F.2d 1207 (4th Cir.

1983) this Court reversed a Trial Court because "the District Court overly restricted the Act's coverage to only those practices which would be unlawful under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. Section 45(a)(1)." at 1220. As the Court's Opinion noted, the South Carolina Unfair Trade Practices Act requires only that the courts be "guided" by interpretations given the Federal Act. This Court specifically held that the Act is not limited by the "scope of Federal law." at 1220. The Court noted that there is "no requirement in the Unfair Trade Practices Act of a contract, combination or conspiracy as there is under Section 1 of the Sherman Act. It is therefore entirely possible that the jury could find (Plaintiff) to have been terminated in furtherance of unfair or anti-competitive purposes... without rendering a verdict duplicative of the Federal claims." *Id.*

Relying on the Court's decision in *Bostick,* the Plaintiff and the District Court determined to submit only a charge to the jury on the Unfair Trade Practices Act and no charge on a common law cause of action. The District Court determined that a common law cause of action for wrongful termination required a showing that a dealer had invested something in his dealership arrangement other than mere services. Under the Unfair Trade Practices Act, however, if the termination were "in furtherance of unfair or anti-competitive purposes" as *Bostick* holds, a different factual predicate is required. The opinion of the Fourth Circuit Court of Appeals in this case, holding that the District Court directed their verdict for Purina on the common law wrongful termination claim necessarily requires an identical holding on the Unfair Trade Practices Act claim, misapprehends the nature of the District Court's rationale and severely limits the scope of the South Carolina Unfair Trade Practices Act without citation to any relevant South Carolina authority, and in contradiction to the Fourth Circuit Court of Appeal's

Opinion in *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir. 1983).

Presumably the South Carolina Unfair Trade Practices Act was intended to have a scope broader than the protection offered by the Federal Trade Comission Act. The South Carolina Unfair Trade Practices Act, like the Federal Trade Commission Act, prohibits unfair or anti-competitive conduct even though it has not matured into a full anti-trust violation. *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). The Supreme Court has held that in making determinations of unfairness, the Federal Trade Commission "like a Court of equity, (can consider) public values beyond simply those enshrined in the letter or encompassed in the spirit of the anti-trust laws." *Federal Trade Commission v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244 (1972). The South Carolina Court has held that in construing the South Carolina Unfair Trade Practices Act, the Courts should not limit the reach of the State law to that only of the Federal Trade Commission Act. The Courts have held that the South Carolina Unfair Trade Practices Act "creates new substantive rights by making unlawful conduct which was not actionable under the common law." *State ex rel. McLeod v. C&L Corp.*, 280 S.C. 519, 313 S.E.2d 334, 338 (S.C. App. 1984).

As another panel of the Fourth Circuit Court of Appeals has pointed out "a termination of a distributor for business reasons is necessarily a common occurrence." *Glaesner v. Beck/Arnley Corp.*, 790 F.2d 384, 388 (4th Cir. 1986). Obviously as the *Glaesner* Court noted, not every termination is wrongful. However, this case involves an unlawful, predatory, anti-competitive termination. While the Defendant, Ralston Purina offered a "business justification" for its termination, that explanation was rejected by the jury,

and specifically rejected by the District Court which held that the only reasonable inference from the evidence was that the termination was for an anti-competitive purpose. *See Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir.), *cert. den.* 464 U.S. 894 (1983); *Gaines W. Harrison & Sons, Inc. v. J.I. Case Co., Inc.*, 180 F. Supp. 243 (E.D.S.C. 1960). The same Trial Judge who found the Defendant in *Glaesner* not to have acted willfully, found the Defendant Ralston Purina to have acted willfully in this case, resulting in the treble damage award. If the reason for termination is, as *Bostick* states, a question of fact, should not this Court be guided as clearly by the Judge's finding of willfulness here, as it was in approving the District Court's finding in *Glaesner.* (790 F.2d 384 at 389). The lack of anti-competitive conduct and any allegation thereabout which prevented recovery under the South Carolina Unfair Trade Practices Act in the *Glaesner* case is present in this case. The jury and the District Court so found.

The Court erred in the following particulars:

(a) The decision of the Fourth Circuit Court of Appeals is in conflict with the Opinion in the case of *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir. 1983) *cert. den.* 464 U.S. 894 (1983).

(b) The Fourth Circuit Court of Appeals misapprehended the lower Court's ruling regarding a South Carolina common law wrongful termination cause of action. As stated in the dissenting opinion rendered by the Fourth Circuit Court of Appeals, the District Court visualized the factual predicate for maintaining the common law action as separate from that for upholding an action based on the Unfair Trade Practices Act.

(c) The Opinion of the Fourth Circuit Court of Appeals misapprehends the law regarding the scope of the South Carolina Unfair Trade Practices Act by equating it with and

failing to distinguish it from the Sherman Act, the Clayton Act and the Federal Trade Commission Act. See *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 at 1220.

(d) The Fourth Circuit Court of Appeals misapprehended or overlooked a substantial issue and fact since this case did not involve an exclusive dealing arrangement as stated in the Court's Opinion, but rather a termination for an unlawful, anti-competitive and retaliatory purpose. See *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316 (1966); and *Adolf Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974). The dealership agreement involved in this case did not require the dealer to deal exclusively in Ralston Purina products as assumed by the Fourth Circuit Court of Appeals in its Opinion, but rather specifically prohibited termination of a dealer for failure to deal in Ralston Purina products exclusively.

(e) The Fourth Circuit Court of Appeals misapprehended or overlooked the following facts concerning the extent to which the Defendant, Ralston Purina, attempted to foreclose the market to competitors by use of unlawful, anti-competitive, retaliatory conduct:

(1) At the time of termination the Plaintiff was the largest seller of Ralston Purina products in the relevant market, the Tri-County area of Charleston, Berkeley and Dorchester Counties, South Carolina. Although all dealers in the relevant market suffered declines in sales during the summer of 1981, and immediately prior to Plaintiff's termination, only the Plaintiff's dealership was terminated. Plaintiff's sales were actually increasing at the time of his termination.

(2) In the relevant product market, bag feed sales, ConAgra was the only competitor of the Defendant Ralston Purina but ConAgra had a very low percen-

tage of the bag feed market in the relative market area. ConAgra had difficulty finding dealers in the Tri-County area and numerous dealers stated that they had quit selling ConAgra's product following knowledge of the Plaintiff's termination by Ralston Purina.

(3) Within two (2) months following termination of Plaintiff's dealership, Ralston Purina began selling at retail some Ralston Purina products below the wholesale price which the Plaintiff had paid only two (2) months earlier.

Conclusion

The decision of the Fourth Circuit Court of Appeals in this case either overlooks or misapprehends the law of the State of South Carolina and is in conflict with that Court's own Opinion in *Bostick Oil v. Michelin.* It overlooks or misapprehends the nature of and the anti-competitive reasons for the Defendant's termination of Plaintiff's dealership. Insofar as the Opinion narrowly restricts the scope of the South Carolina Unfair Trade Practices Act to the limitations of the Federal anti-trust laws and the Federal Trade Commission Act, it renders the South Carolina statute a nullity. The majority opinion recognizes that this case involves important issues regarding the scope of the South Carolina Act. The prevalence of anti-trust, dealer termination and unfair trade practice cases in the Fourth Circuit Court of Appeals arising out of the District of South Carolina suggests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Morris D. Rosen*
Susan C. Rosen
Tara O. Hawk
ROSEN, ROSEN & HAGOOD
Post Office Box 893
Charleston, SC 29402
(803) 577-6727
**Counsel of Record*

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2337

CHUCK'S FEED & SEED CO., INC.
Appellee,

v.

RALSTON PURINA COMPANY,
A CORPORATION,
Appellant.

South Carolina Defense Trial
Attorneys' Association,
Amicus Curiae.

Appeal from the United States District Court for the
District of South Carolina, at Charleston.
Solomon Blatt, Jr., *District Judge.* C/A 83-195-8)

Argued: May 8, 1986 Decided: February 9, 1987

Before MURNAGHAN and SPROUSE, *Circuit Judges,*
and HAYNESWORTH, *Senior Circuit Judge.*

Timothy W. Bouch and Brad J. Waring (Young, Clement, Rivers & Tisdale on brief) for Appellant; Richard S. Rosen (Susan C. Rosen; Rosen, Rosen & Hagood on brief) for

Appellee; (J. Brantley Phillips, Jr.; Natalma M. McKnew; Leatherwood, Walker, Todd & Mann; L. Sidney Connor IV; Nelson, Mullins, Grier & Scarborough; William H. Davidson, II; Nauful & Ellis on brief) for Amicus Curiae.

MURNAGHAN, *Circuit Judge:*

Ralston Purina Company appeals from the judgment of the United States District Court for the District of South Carolina, based on a jury verdict, that it violated the South Carolina Unfair Trade Practices Act by terminating its dealership relationship with Chuck's Feed & Seed Co. The case raises important questions concerning the scope of the South Carolina statute.

I.

Chuck's Feed and Seed Co., Inc. under the direction of Charles (Chuck) Lambert, opened a retail feed store in 1972 in Summerville, South Carolina, a suburban area near Charleston. Lambert's store catered to pet owners and small farmers, selling livestock and pet feeds in bags or containers, rather than in bulk. From 1975 until February, 1982, Lambert carried products manufactured by Ralston Purina Company. Although no written dealership agreement was signed, Lambert was regarded as a dealer in Purina's distribution system. As such, he purchased products directly from Purina, and was entitled to resell these products to other retailers who were known as "sub-dealers." Lambert was also authorized to use Purina signs and displays in his store. Purina's District Manager informed Lambert that as long as Lambert continued to sell Purina feed, Purina would not authorize another Purina dealership within ten miles of his store. Purina adhered to that policy during Lambert's tenure as a dealer. Lambert was a successful Purina dealer with a high volume of Purina feed sales.

In the summer of 1981, the District Sales Manager for ConAgra Feed asked Lambert if he would be interested in carrying the ConAgra brand. ConAgra is a direct competitor of Purina because the two brands of feed are similar in quality and price. Lambert had previously carried many other brands of feed, but the other brands were less expensive and inferior in quality to Ralston Purina's feed, and Lambert testified that these brands did not compete with Purina. When Lambert informed Purina's District Sales Manager, Michael Munn, that he was considering ConAgra's proposal, Munn initially told Lambert that if Lambert started to carry ConAgra feed, Lambert's Purina dealership would be terminated. Later, Munn returned to Lambert's store and apologized for his earlier remarks. Munn told Lambert that his Purina dealership would not be cut off if he chose to sell ConAgra feed, but that Munn doubted that Lambert could sell both feeds successfully. Lambert thereafter began to sell ConAgra feed as well as Purina feed in his store. On several occasions, Munn expressed concern to Lambert about Lambert's sales of ConAgra. In February, 1982, Purina terminated Lambert's dealership. Purina's stated reason for the termination was "failure to obtain market penetration."

Lambert made several attempts to have his dealership reinstated, but was refused. He also attempted to obtain Purina products as a "sub-dealer," but was unable to secure the products at wholesale prices. To offset his declining feed sales, Lambert began to carry pet supplies and exotic birds. Lambert's gross sales, which had remained relatively static during the period of his Purina dealership, increased significantly following his termination, rising from $387,562 in 1981 to $559,167 in 1982 and $717,768 in 1983.

Lambert and Chuck's Feed & Seed Co., Inc. filed the present action on January 25, 1983. The complaint sought recovery from Ralston Purina on four causes of action: (1)

violation of §1 of the Sherman Act, 15 U.S.C. §1; (2) violation of §3 of the Clayton Act, 15 U.S.C. §14; (3) violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §39-5-20; and (4) common-law wrongful termination. Ralston Purina moved for partial summary judgment as to the Unfair Trade Practices Act claim, arguing that the Act is unconstitutionally vague. The district court denied the motion. Trial began on March 5, 1985. Following the close of the plaintiffs' case, the district court denied Ralston Purina's motion for a directed verdict on the federal antitrust claims. However, the court granted Purina's motion to direct a verdict for the defendant on the claim for common-law wrongful termination.

At the close of all the evidence, the jury was asked to identify its verdict as to each of the remaining causes of action. No other special interrogatories were submitted to the jury. The jury returned a verdict for Ralston Purina on the Sherman Act and Clayton Act claims. However, the jury returned a verdict for the plaintiffs on the South Carolina Unfair Trade Practices Act claim, assessing actual damages at $78,750. The district judge subsequently ruled that Purina's violation of the South Carolina Act was "willful." Pursuant to S.C. Code Ann. §39-5-140, which prescribes the trebling of damages and the award of attorneys' fees to plaintiffs in cases of "willful" violations, the district judge trebled the damages award to $236,250 and awarded $86,879.75 in attorney's fees and costs, for a total award of $323,129.75. On October 28, 1985, the district court denied Ralston Purina's motion for judgment notwithstanding the verdict. Purina makes four arguments on appeal: (1) that the district court erred in denying its motion for j.n.o.v.; (2) that the South Carolina Unfair Trade Practices Act is unconstitutionally vague; (3) that any violation that it may have committed was not "willful"; (4) that the damages award is unsupported by the evidence.

II.

In reviewing the denial of a directed verdict or judgment n.o.v., the court must consider whether, when the evidence is taken in the light most favorable to the party opposing the motion, there is any substantial evidence to support the jury's verdict. If there is any such evidence, the verdict should be upheld. *Evington v. Forbes,* 742 F.2d 834, 835 (4th Cir. 1984).

The South Carolina Unfair Trade Practices Act (UTPA) provides that

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

S.C. Code Ann. §39-5-20(a). Section 39-5-20(b) states that it is the intent of the state legislature that the construction of paragraph (a) should be guided by the decisions of the Federal Trade Commission and the federal courts in interpreting §5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1).[1] This court has suggested, in *dicta,* that the UTPA may also extend to conduct which would give rise to a cause of action for wrongful termination under South Carolina common law. *Bostick Oil Co. v. Michelin Tire Corp.,* 702 F.2d 1207, 1220 (4th Cir. 1983), *cert. denied,* 464 U.S. 894 (1983).

We need not decide whether the UTPA should be construed to encompass wrongful termination claims, because no such claim has been made out on the facts of this case. In directing a verdict for Purina on Lambert's common-law

---

[1]Section 5(a)(1) of the Federal Trade Commission Act provides:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

wrongful termination claim, the district court found he evidence insufficient to support such a common-law claim. Necessarily, then, the court also found evidence insufficient to support an identical claim brought under the label of the Unfair Trade Practices Act. Because we have not been asked to review the district court's ruling on that directed-verdict motion, we must accept the district court's conclusions.

We therefore turn to the task of interpreting the independent meaning of the Unfair Trade Practices Act. Like the Federal Trade Commission Act, the South Carolina statute is aimed at two distinct kinds of conduct: unfair or deceptive practices and anticompetitive practices. Only anticompetitive practices are at issue here. The few cases that have interpreted the South Carolina UTPA have not been concerned with the anticompetitive issue. *Cf., Clarkson v. Orkin Exterminating Co.*, 761 F.2d 189 (4th Cir. 1985); *State ex rel. McLeod v. C&L Corp.*, 313 S.E.2d 334 (S.C. App. 1984) (both deal with consumer deception). Accordingly, we must look to interpretations of the FTC Act to guide decision under the UTPA insofar as it prohibits anticompetitive conduct.

In the area of anticompetitive practices, the FTC Act functions as a kind of penumbra around the federal antitrust statutes. An anticompetitive practice need not violate the Sherman Act or the Clayton Act in order to violate the FTC Act. *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972). However, the scope of the FTC is nonetheless linked to the antitrust laws. The power of the Federal Trade Commission to declare anticompetitive trade practices "unfair" extends primarily to "trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate those laws." *Federal Trade Comm'n v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). The Supreme Court has ex-

plained that "[i]t is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . — to stop in their incipiency acts and practices which, when full blown, would violate those Acts." *Federal Trade Comm'n v. Motion Picture Advertising Co.*, 344 U.S. 392, 394-95. (1953). The Federal Trade Commission itself looks to antitrust principles in deciding whether §5 of the FTC Act has been violated. *See Belton Electronics Corp.*, Trade Reg. Rep. (CCH), 1979-1983 Transfer Binder, ¶21,934 at 22,375.

The issue presented by this case is the legality of a dealership arrangement which requires the dealer to deal exclusively in the products of one manufacturer. Such exclusive dealing arrangements have never been *per se* illegal under the antitrust laws. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 325-29 (1961). Instead, exclusive dealing arrangements violate the antitrust laws only if they are likely to foreclose the entry into a substantial part of the market of products that compete with the products benefitting from the exclusive dealing arrangement. *Id.; Standard Oil Company of California v. United States,* 337 U.S. 293, 314 (1949); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356-57 (1922). In *Tampa Electric Co.*, the Court explained that "even though a contract is found to be an exclusive-dealing arrangement, it does not violate the [antitrust laws] unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." 365 U.S. at 327. In other words, the plaintiff must show that "the opportunities for other traders to enter into or remain in that market must be significantly limited" by the exclusive-dealing arrangement. *Id.* at 328. Thus, what has concerned the courts about exclusive dealing arrangements is the possibility that a single manufacturer will control all or a substantial number

of the available retail outlets for a certain kind of product in a given geographical area. See id. at 327-29; *Standard Oil Co. of California v. United States,* 337 U.S. at 314. When a single manufacturer has exclusive dealing arrangements with a substantial number of the available dealers in an area, it will be difficult for the manufacturer of a competing product to break into the market for that kind of product.

In *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. at 327-29, the Court outlined the proof necessary to show that an exclusive dealing arrangement violated the antitrust laws. First, the "line of commerce," *i.e.,* the type of goods, must be determined. *Id.* at 327. Second, the geographical area of effective competition in that line of commerce must be demonstrated, because "the threatened foreclosure of competition must be in relation to the market affected." *Id.* Third, the exclusive dealing arrangement at issue must be found to extend to "a substantial share of the relevant market." *Id.* at 328. In other words, the plaintiff must show tht competing manufacturers are excluded from a substantial share of the relevant market because that share of the market is controlled by the exclusive dealing arrangement. Lower court cases following *Tampa Electric Co.* have focused on the mathematical figure for the percentage of the market foreclosed due to the exclusive dealing arrangement at issue. *Tampa Electric Co.* had held that a market foreclosure of 0.77% was not substantial enough to constitute a violation of the antitrust laws. 365 U.S. at 333-35. In subsequent cases, lower courts have disagreed as to the percentage of market foreclosure required to trigger an antitrust violation. Some courts have held that market foreclosure of up to 15% may be insubstantial and therefore lawful. *American Motor Inns, Inc. v. Holiday Inns, Inc.,* 521 F.2d 1230, 1252 (3d Cir. 1975) (14.7%); *Cornwell Quality Tools Co. v. CTS Co.,* 446 F.2d 825, 831 (9th Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972)

(10-15%). On the other hand, market foreclosure of 24% was held to violate the law in *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1301, 1304 (9th Cir. 1982), *cert. denied*, 459 U.S. 1009 (1982).

The Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), reaffirms and further develops the analysis of the earlier cases. *Sylvania* was not an exclusive dealing case; rather, it dealt with a manufacturer's territorial restrictions on its dealers. However, the Court's language was broad enough to extend to all "vertical" trade restrictions,[2] including exclusive dealing arrangements. The Court emphasized that the plaintiff in a vertical restraint case must show a significant negative impact on "interbrand" competition — that is, on competition among *manufacturers* of different brands. Interbrand competition is more important than "intrabrand" competition, which is the competition among *dealers* in the same market area who sell the same brand. 433 U.S. at 52 n.19, 54-57. This emphasis reaffirms the holdings of the earlier cases that the courts' focus in evaluating exclusive dealing arrangements should be on their effect in shutting out competing manufacturers' brands from the relevant market.

The Sylvania Court also held, though, that a "rule-of-reason" approach must be applied to vertical restraints. 433 U.S. at 57-58. Under such an approach, a court must con-

[2]A "vertical" restriction is one that is embodied in an agreement between a seller and a purchaser of a product, and which restricts the activities of the purchaser with respect to third Parties. Any arrangement between a manufacturer and a dealer whereby a dealer agrees not to buy from certain third parties, not to sell to certain third parties, or not to sell in certain locations is a "vertical" restriction. By contrast, a "horizontal" restriction involves agreements between competing sellers or competing buyers.

sider whether there are any procompetitive justifications for the use of the particular vertical restriction at issue. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 343 (1982). In the context of exclusive dealing arrangements, the application of the "rule-of-reason" analysis would seem to mean that a court should not look only at the numerical percentage of market foreclosure in order to decide whether or not a particular arrangement is illegal. Rather, after determining that market foreclosure is substantial, the court should consider whether an otherwise unacceptable level of maket foreclosure is justified by procompetitive efficiencies.

The same approach, only slightly more liberal in scope, was applied under §5(a) of the FTC Act by the Federal Trade Commission itself in *Beltone Electronics Corp.,* Trade Reg. Rep. (CCH), 1979-1983 Transfer Binder, ¶21,934 at 22,375, 22,387-95 (1982). There, a manufacturer of hearing aids had engaged in a practice of requiring exclusive dealing arrangements with dealers who sold the hearing aids to the public. The Commission found that Beltone's activities did not violate the FTC Act where its exclusive dealing contracts extended to only 7 or 8% of hearing aid dealers in the relevant market, which there was the national market, where its share of national hearing aid sales had dropped during recent years, and where there was evidence that competing hearing aid manufacturers had little trouble finding dealers to sell their products. *Id.* at 22, 394-95.[3]

---

[3]The Supreme Court's opinion in *Federal Trade Commission v. Brown Shoe Co.,* 384 U.S. 316 (1966), relied on by Lambert, does not undermine this analysis or set forth a different standard. *Brown Shoe* involved a manufacturer of shoes who had entered into exclusive dealing arrangements with a large number of shoe retailers. The Federal Trade Commission had concluded that Brown Shoe's activities were unfair trade practices and issued a cease and desist order against the company.

In summary, the appropriate analysis to apply to an exclusive dealing arrangement under the FTC Act, and therefore under the South Carolina act as well, is as follows. First, the court must determine the nature of the relevant market by identifying the particular type of goods and the geographical area involved. Second, the court must determine how much of that market has been closed off to the products of competing manufacturers because of exclusive dealing arrangements required by the defendant. In conjunction with this, the court should look at all relevant evidence indicating whether or not competitors have found or are likely to find it difficult to enter or remain in the market. Third, the court should consider any procompetitive effects of the exclusive dealing arrangements that would justify their use.

Applying this analysis to the present case, it becomes clear that the district court should have granted Ralston Purina's motion for judgment notwithstanding the verdict. Lambert simply failed to offer the relevant evidence concern-

---

The Supreme Court's opinion, which is very short, did not explicitly address the merits of whether Brown Shoe's conduct amounted to an unfair trade practice. Rather, the Court used the occasion to enunciate a more general standard. The Court of Appeals had set aside the Commission's order on the theory that the scope of the FTC Act was no broader than that of the antitrust laws. Because Brown Shoe's activities did not violate the antitrust laws, the Court of Appeals had apparently reasoned, it could not have violated the FTC Act. *Id.* at 320-22. The Supreme Court reversed, but held merely that the Federal Trade Commission had the discretion to declare trade practices unfair even where those practices did not violate the antitrust laws. *Id.* at 321-22. The Court did not explain why it believed that the FTC was correct in finding a violation of §5 of the FTC Act, other than to express deference to the agency's authority. The opinion sets forth no standards or guidelines to help a court that must decide in the first instance whether an exclusive dealing arrangement is invalid, rather than review a decision of the FTC.

ing the extent to which Ralston Purina may have used exclusive dealing arrangements to "foreclose the market," or, in other words, to keep competing brands of feed out of a substantial percentage of the feed dealerships in the area. Instead, almost all of Lambert's evidence related to his own individual experience with Ralston Purina. That alone is not enough to show a negative impact on competition in the market as a whole.

Additional support for judgment n.o.v. on these facts is found in *Stearns v. Genrad, Inc.*, 564 F.Supp. 1309 (M.D.N.C. 1983), *aff'd on other grounds*, 752 F.2d 942 (4th Cir. 1984). That case was decided under the North Carolina Unfair Trade Practices Act, which is very similar in language and scope to South Carolina's act. In that case, Carolina Acoustics Company (CAC) alleged that it had been terminated as a dealer of products manufactured by Genrad because CAC refused to deal exclusively in Genrad products. The district court granted summary judgment to Genrad on the Unfair Trade Practices Act claim. *Id.* at 1318. The court explained that

> CAC has made no attempt to determine who the other competitors were in the market, whether other distributors were available to those competitors, whether those competitors in fact needed distributors to get their competing products to the consumer, and what, if any, affect the alleged exclusive dealing arrangement may have had upon the ultimate consumer of and competition in the products in question. Nor has CAC made any attempt to show whether other Genrad distributors sold competing lines of products while they were Genrad distributors. In short, CAC has not shown, nor has it attempted to show, any adverse effect on overall

> competition in any line of commerce or relevant market resulting from the alleged exclusive dealing arrangement.

Id. at 1314. Exactly the same failure of proof occurred here.

Because we find that there was insufficient evidence to support the verdict in Lambert's favor, we reverse the judgment of the district court. It is consequently unnecessary for us to consider Purina's other claims of error.

REVERSED.

SPROUSE, *Circuit Judge,* dissenting:

I respectfully dissent. I concur with the portion of the majority opinion holding that Lambert presented insufficient evidence of anticompetitive conduct by Ralston Purina Co. I would hold, however, that there was sufficient evidence from which a jury could determine Ralston committed an unfair trade practice under South Carolina's Unfair Trade Practices Act (UTPA) in terminating Lambert's dealership. *See Bostick Oil Co. v. Michelin Tire Corp.,* 702 F.2d 1207, 1220 (4th Cir.), *cert. denied,* 464 U.S. 894. (1983).

It is true that the district court directed a verdict on Lambert's state common law action for wrongful termination. The trial court, however, visualized the factual predicate for maintaining the common law action as separate from that for upholding an action based on the UTPA. As a result, the court instructed the jury on the necessary factual elements for finding an unfair practice that would violate the statute. The jury found these facts to exist. I would uphold that jury determination.

Appendix B
Opinion of United States Court of Appeals on Petition for Rehearing

UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2337

Chuck's Feed and Seed Co., Inc., etc.
Appellee,

v.

Ralston Purina Company, etc.,
Appellant.

South Carolina Defense Trial
Attorney's Association,
Amicus Curiae.

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

ORDER

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix B
Opinion of United States Court of Appeals
on Petition for Rehearing

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Sprouse and Judge Haynsworth.

For the Court,
/s/ John M. Greacen
Clerk

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CIVIL ACTION DOCKET NO. 2:83-0195-8

Chuck's Feed and Seed Co., Inc.,

Plaintiff,

v.

Ralston Purina Company,

Defendant.

JUDGMENT

This action came on for trial before the court, United States District Judge Sol Blatt, Jr. presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged ..... that the Plaintiff, Chuck's Feed and Seed Co., Inc., recover of the defendant, Ralston Purina Company, the sum of Two Hundred Thirty-Six Thousand, Two Hundred and Fifty Dollars and no/100 ($236,250.00) actual damages, the sum of Eighty-Three Thousand, Three Hundred and Seventy-Nine Dollars and Seventy-Five Cents ($83,379.75) attorneys fees and Three Thousand, Five Hundred Dollars and no/100 ($3,500.00) costs for a total sum of Three Hundred Twenty-Three Thousand, One Hundred and Twenty-Nine Dollars and

Seventy-Five Cents ($323,129.75) with interest thereon at the rate of 7.60% as provided by law.

Dated: July 2nd, 1985

John W. Williams, Clerk
/s/Robin C. Kelly,
Deputy Clerk

Dated at: Charleston, South Carolina